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**No. 94-3**

Supreme Court, U.S.

**FILED**

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IN THE

# **Supreme Court of the United States**

October Term, 1994

**REYNOLDSVILLE CASKET CO., et al.,**  
*Petitioners,*

vs.

**CAROL L. HYDE,**  
*Respondent.*

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF OHIO

**AMICUS CURIAE THE DALKON SHIELD CLAIMANTS TRUST'S  
ANSWER TO RESPONDENT'S OPPOSITION TO  
MOTION TO FILE BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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The Dalkon Shield Claimants Trust ("the Trust"), filed its Motion for Leave to file an *Amicus Curiae* Brief and Brief in Support of Petition for Writ of Certiorari in this matter on August 3, 1994 (hereinafter "motion and *amicus* brief"). On August 25, 1994, Respondent filed a document entitled "Respondent's Supplemental Brief in Response to Motion for Leave to File *Amicus Curiae* Brief." In her "Supplemental Brief," Respondent erroneously suggests that the Trust's motion and *amicus* brief were not timely filed.

The Trust's counsel was not served with Respondent's "Supplemental Brief," and would not have known of its existence but for a routine call to the clerk's office on September 9, 1994, to inquire into the status of the case. Counsel immediately requested a copy of the Supplemental Brief from Respondent's counsel, and received it on September 12, 1994. Because the Supplemental Brief includes inaccurate facts and argument regarding the timeliness of the Trust's motion and *amicus* brief, a brief Answer is necessary.

#### **I. THE TRUST'S MOTION AND AMICUS BRIEF WERE TIMELY**

The Ohio Supreme Court decision for which review is sought was finalized April 6, 1994, making the Petition for Writ of Certiorari due July 5, 1994. According to the U.S. Supreme Court clerk's office, that Petition was filed on June 30, 1994. Respondent claims in her Supplemental Brief that it was filed July 1, 1994. Either way, the Trust's August 3 motion and *amicus* brief were timely.

Supreme Court Rules of Practice 37.2 and 37.4, read in conjunction, provide that a party wishing to file for leave to appear as *amicus* on behalf of the petitioner

shall file a motion for leave and *amicus* brief "within the time allowed for filing a brief in opposition to the petition for certiorari . . . ." Respondent errs, however, in asserting that the Trust's motion and *amicus* brief were therefore due July 31, 1994.<sup>1</sup>

Although not mentioned by Respondent, the Rule governing the time for filing a brief in opposition to the petition for writ of certiorari is Supreme Court Rule of Practice 15.2. That Rule provides, in pertinent part:

The respondent shall have 30 days . . . after receipt of a petition within which to file 40 printed copies of an opposing brief . . . .

(Emphasis supplied). June 30, 1994, was the Thursday before the July 4 weekend. There was only one business day—Friday, July 1—between June 30 and Tuesday, July 5. Given the normal three days required for service by first class mail (*see, e.g.,* Fed. Civ. R. Pro. 6(e) and Fed. R. App. Pro. 26(c)), Respondent presumably did not receive the petition until July 5, 1994, at the earliest. The opposing brief, and motion and *amicus* brief, were therefore due August 4, 1994, at the earliest. The Trust's motion and *amicus* brief were filed August 3, 1994, one day before they were due.

## II. IF NECESSARY, LEAVE TO FILE OUT OF TIME SHOULD BE GRANTED

Respondent's timeliness arguments are based on erroneous filing dates, Sunday due dates, and a misstatement of the applicable rules. Her Supplemental Brief should be rejected. But even if Respondent's arguments are accepted, this Court could, and should,

<sup>1</sup> Since July 31 falls on a Sunday, it could not possibly be the due date. The Trust assumes that Respondent intended to argue that the due date was August 1.

consider the Trust's motion and *amicus* brief. *See, e.g., American Foreign Service Ass'n. v. Garfinkel*, 489 U.S. 1050, 109 S.Ct. 1307, 103 L.Ed.2d 577 (1989); *Booth v. Maryland*, 479 U.S. 1081, 107 S.Ct. 1280, 94 L.Ed.2d 139 (1987); *Intl. Union, UAW v. Brock*, 475 U.S. 1093, 106 S.Ct. 1487, 89 L.E.2d 890 (1986); and *Goldstein v. California*, 414 U.S. 883, 94 S.Ct. 27, 38 L.Ed.2d 131 (1973), all granting motions to file *amicus* briefs out of time for good cause shown.

Good cause exists because the Trust's interpretation of the Supreme Court Rules of Practice was clearly reasonable. The time for filing a motion and *amicus* brief does not begin to run until Respondent's "receipt" of a petition, and there was only one business day between June 30, 1994, and July 5, 1994. Using three days for first class mail service, the Trust reasonably calculated Respondent's "receipt" of the petition as occurring on July 5, making the motion and *amicus* brief timely when filed August 3.

Further, Respondent cannot claim she was surprised or prejudiced by the motion and *amicus* brief, since: 1) Dalkon Shield plaintiffs participated as *amici* in the Ohio Supreme Court; 2) the Trust participated as *amicus* in the Ohio Supreme Court; and 3) the Trust had requested consent to appear as *amicus* in this Court (*see* July 25, 1994 letter attached as Exh. B to the Trust's motion and *amicus* brief, where Respondent refused to consent).

Finally, good cause exists because this Court encourages the filing of any *amicus* brief "which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties . . . ." Supreme Court Rule of Practice 37.1. The Trust's *amicus* brief is the only brief arguing, with supporting authority, for a summary reversal of the clearly

erroneous Ohio Supreme Court decision in this case. It therefore brings relevant matter to this Court's attention.<sup>2</sup>

Because the Trust's motion and *amicus* brief were filed within the times provided by the Supreme Court Rules of Practice, Respondent's opposition to leave is without basis. In the alternative, the Trust respectfully moves for leave to file its motion and *amicus* brief out of time, for good cause shown.

Respectfully submitted,

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<sup>2</sup> Respondent's opposition also errs in its recitation of alleged "misstated material facts." However, since those errors have no relevance to the Trust's motion and *amicus* brief, they will not be addressed in this Answer.